In the Court of Appeals of the State of Alaska

Claude Edward Fowlkes III,
Appellant,

v.

State of Alaska,
Appellee.

Court of Appeals No. **A-12604**

Order

Date of Order: **August 20, 2020**

Trial Court Case No. **4FA-14-01758CR**

Before: Allard, Chief Judge, Wollenberg, Judge, and Mannheimer, Senior Judge.[*]

A jury found Claude Edward Fowlkes III guilty of three crimes: first-degree sexual assault (sexual penetration coerced by force), second-degree sexual abuse of a minor (sexual penetration with a child between the ages of 13 and 16), and first-degree sexual abuse of a minor (sexual penetration with a child younger than 16 when the offender occupies a position of authority over the victim).

At Fowlkes's sentencing, the superior court merged the jury's verdicts for first-degree sexual assault and second-degree sexual abuse — *i.e.*, the court entered a single conviction based on these two verdicts — but the superior court entered a separate conviction for first-degree sexual abuse (the charge based on the "position of authority" theory).

On appeal, Fowlkes raises two challenges specific to his conviction for first-degree sexual abuse of a minor. First, he argues that he should not have been found

[*] Sitting by assignment made under article IV, section 11 of the Alaska Constitution and Alaska Administrative Rule 23(a).

guilty of *first-degree* sexual abuse of a minor, because the evidence presented at his trial was not legally sufficient to establish one of the elements of that offense — specifically, the element that Fowlkes occupied a "position of authority" over the victim, as that term is defined in AS 11.41.470(5). Second, Fowlkes argues that even if he was guilty of first-degree sexual abuse, he should not have received a separate conviction for this crime — that, instead, the sentencing judge should have merged this offense with Fowlkes's other two offenses, and should have entered a single merged conviction for all three offenses.

Fowlkes's merger argument is supported by Alaska law. In *Yearty v. State*, this Court held that under *Whitton v. State*[1] — Alaska's test for determining whether separate convictions violate the double jeopardy clause of the Alaska Constitution — a single act of sexual penetration cannot support separate convictions for sexual assault and sexual abuse of a minor.[2] Recently, in *State v. Thompson*, the Alaska Supreme Court endorsed this holding: "We agree with the *Yearty* court's explication of the intent and societal interests prongs of *Whitton* in sex crimes and we see no reason to disturb it. The basic purpose of both sexual assault and sexual abuse of a minor statutes is to protect victims from offensive sexual conduct."[3]

Given these decisions, it is clear that the superior court erred in entering a separate conviction for first-degree sexual abuse of a minor. That is, even assuming

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1 *Whitton v. State*, 479 P.2d 302, 312 (Alaska 1970).

2 *Yearty v. State*, 805 P.2d 987, 993-95 (Alaska App. 1991).

3 *State v. Thompson*, 435 P.3d 947, 957 (Alaska 2019).

there was sufficient evidence to support a guilty verdict for first-degree sexual abuse of a minor under a "position of authority" theory, Fowlkes should not have received a separate conviction for this crime.

This conclusion would seemingly moot Fowlkes's challenge to the sufficiency of the evidence to support his first-degree sexual abuse of a minor conviction. However, we recognize that if all three of Fowlkes's crimes are merged into a single conviction, the State is entitled to elect which crime Fowlkes stands convicted of — either the first-degree sexual assault charge or the first-degree sexual abuse of a minor charge.

Accordingly, **IT IS ORDERED**:

1. By the close of business on **Thursday, September 3**, the State shall file a pleading notifying this Court whether it would elect to have the superior court enter a merged conviction for first-degree sexual abuse of a minor as opposed to a merged conviction for first-degree sexual assault.

2. If the State prefers to have the merged conviction entered for first-degree sexual abuse of a minor, we will decide Fowlkes's sufficiency of the evidence claim.

3. On the other hand, if the State prefers to have the merged conviction entered for first-degree sexual assault, or if the State has no preference in this matter, then the question of whether the evidence supports Fowlkes's conviction for first-degree sexual abuse of a minor would seemingly be moot. Nevertheless, if either party believes that the merged sexual abuse of a minor count would not be moot under these

circumstances, they may have until **Thursday, September 10**, to file a pleading explaining their position.

4. After we receive these pleadings (or after the September 10 deadline for filing these pleadings has expired), this Court will resume our consideration of Fowlkes's appeal.

Entered at the direction of the Court.

Clerk of the Appellate Courts

/s/ R. Montgomery-Sythe

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Ryan Montgomery-Sythe,
Chief Deputy Clerk

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